

Former Heads of State on Trial

Mikhail Wladimiroff

Follow this and additional works at: <http://scholarship.law.cornell.edu/cilj>



Part of the [Law Commons](#)

Recommended Citation

Wladimiroff, Mikhail (2005) "Former Heads of State on Trial," *Cornell International Law Journal*: Vol. 38: Iss. 3, Article 13.
Available at: <http://scholarship.law.cornell.edu/cilj/vol38/iss3/13>

This Comment is brought to you for free and open access by the Journals at Scholarship@Cornell Law: A Digital Repository. It has been accepted for inclusion in Cornell International Law Journal by an authorized administrator of Scholarship@Cornell Law: A Digital Repository. For more information, please contact jmp8@cornell.edu.

Former Heads of State on Trial

Mikhail Wladimiroff†

Introduction	949
I. The Courts	950
A. Special Courts	950
B. Personal Jurisdiction	954
II. Functional Responsibility	954
A. Command Responsibility	956
B. Superior Responsibility	957
III. From Impunity to Accountability	958
A. Immunity	959
B. State Practice and International Cases	960
IV. Trial Issues	965
A. Legal Representation, the Milošević Trial	965
B. Expectations, the Saddam Hussein Trial	969
Conclusion	971

Introduction

When I arrived at the Detroit Airport on my way to the symposium “Milošević and Hussein on Trial” at Cornell, I joined the line as all other visitors, shuffling on to the counter and showing my Dutch passport to the Homeland Security officer. He checked it, as well as my flight tickets, noticed the connecting flight to Syracuse, and asked me the purpose of my visit. I told him I was on my way to a symposium at Cornell. “About what?” he asked, and—almost routinely—I responded: “On international criminal law.” Then he took me by surprise by asking, “Are you for or against it?” The question puzzled me for a moment: should I interpret it as the way the ordinary American perceives the issue, or should I simply ignore my own perception of the situation? I decided to answer, “It is just another area of law, isn’t it? It doesn’t matter where you live.” The officer seemed satisfied, I passed through, and arrived in the United States.

Traditionally, politicians, officials, and national leaders have not been held responsible for war crimes, crimes against humanity, and genocide. Although the idea of accountability for violations of international humanitarian law began to take hold at the beginning of the last century, it was only sixty years ago that the first top military and civilian leaders were brought to trial. These crimes are usually referred to as “international

† Defense Counsel at Wladimiroff & Waling N.V., Attorneys at Law in The Hague, The Netherlands; Professor of Law (Economic Criminal Law) 1986-1997 University Utrecht, The Netherlands; J.D. 1972 University Leiden, The Netherlands. A summary of parts of this paper was presented at the Cornell International Law Journal 2005 Symposium, “Milošević and Hussein on Trial,” February 25-26, 2005.

crimes,” in contrast with those acts regulated by domestic law. This article explores the development of accountability for violations of international humanitarian law for former heads of states and other national leaders, with a focus on Slobodan Milošević and Saddam Hussein, and discusses a number of issues that arise in the trial process, on the basis of my experiences¹ in a number of such proceedings.

I. The Courts

Violations of international humanitarian law are prosecuted before a variety of tribunals: some are more or less of a domestic nature, while others are international or internationalized courts.

Domestic courts are a part of a state's legal system, and are usually established by parliamentary legislation, sometimes on the basis of extraordinary powers. Domestic courts obviously have jurisdiction over crimes committed within their own territory, which, in many cases, extends to jurisdiction over matters that implicate the state's nationals, or relevant national interests. For some crimes, such as violations of international law, domestic courts may exercise universal jurisdiction.² In the Pinochet case, for example, an investigative magistrate of a Spanish domestic court exercised universal jurisdiction by requesting the extradition of General Augusto Pinochet, the former head of state of Chile, from the United Kingdom to Spain.³

Besides ordinary national courts, there are special courts to try violations of international humanitarian law, such as international courts, and courts of a hybrid nature, including special domestic courts. These courts differ both in their jurisdiction and the applicable law. The “pilot” courts for the application of international humanitarian law are the military tribunals of Nuremberg and Tokyo—the first international courts that tried individuals for war crimes and crimes against humanity.⁴

A. Special Courts

The Iraqi Special Tribunal (IST), which will try Saddam Hussein, is an example of a domestic court *sui generis*. It was established by the Coalition Provisional Authority, and has competence *ratione personae* to prosecute Iraqi nationals, and residents of Iraq accused of international crimes and

1. In 1995–1997, I was Defense Counsel of the first defendant, Duško Tadić, before the International Criminal Tribunal for the former Yugoslavia (ICTY); in 1999–2000 I defended Alfred Musema before the International Criminal Tribunal for Rwanda (ICTR); in 2001 and 2002 I participated in the Milošević trial before the ICTY as one of the *amici curiae*. In 2003, I acted on behalf of the Republic of Liberia before the International Court of Justice to challenge the indictment of President Charles Taylor by the Special Court for Sierra Leone. In 2004 and 2005, I was involved in training programs for the Iraqi judiciary, including the Iraqi Special Court, which will try Saddam Hussein.

2. Belgium courts had a unique universal jurisdiction over international crimes that attracted complaints against (former) foreign officials. It was limited to the usual criteria for competence after diplomatic pressure.

3. See *infra* note 41 and accompanying text.

4. Both tribunals were also competent to try crimes against the peace.

some specific national offences. Common domestic courts seldom have a limited temporal jurisdiction; special courts, however, may be endowed with a competence *ratione temporis* that is limited to a specific timeframe, usually related to a troublesome period of time in that country.

In 1992, the U.N. Security Council issued Resolution 808,⁵ stating that "an international tribunal shall be established for the Prosecution of persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991."⁶ This new court—the International Criminal Tribunal for the former Yugoslavia (ICTY)—became the first international criminal court since the military tribunals of Nuremberg and Tokyo.⁷ The ICTY is an ad hoc court with territorial jurisdiction limited to the territory of the former Yugoslavia, and temporal jurisdiction limited to those violations committed after 1991, and continuing until the Security Council decides otherwise.⁸ In 1994, the Security Council established a second international criminal court in response to mass atrocities in Rwanda.⁹ The court's purpose is the "prosecut[ion] of persons responsible for genocide and other serious violations of international humanitarian law committed in the territory of Rwanda and Rwandan citizens responsible for the crimes [just mentioned] committed in the territory of neighbouring States, between 1 January and 31 December 1994."¹⁰ The International Criminal Tribunal for Rwanda (ICTR) is—comparable to the ICTY—an ad hoc court with limited territorial and temporal jurisdiction.¹¹ On 17 July 1998, another international court was created at the United Nations Diplomatic Conference in Rome. The vast majority of the State parties to the conference signed the treaty to establish the International Criminal Court (ICC).¹² The ICC has a comple-

5. S.C. Res. 808, ¶ 1, U.N. Doc. S/RES/808 (Feb. 22, 1993).

6. The Statute was adopted by Resolution 827 of 25 May 1993 and amended by Resolutions 1166 of 13 May 1998, 1329 of 30 November 2000 and 1411 of 17 May 2002. S.C. Res. 827, U.N. Doc. S/RES/827 (May 13, 1998); S.C. Res. 1166, U.N. Doc. S/RES/1166 (May 13, 1998); S.C. Res. 1411, U.N. Doc. S/RES/1411 (May 17, 2002).

7. See, e.g., Ed Vulliamy, *In Times of Trial*, THE GUARDIAN (London), Oct. 31, 1995, at T6.

8. In 2002, both the ICTY and the ICTR endorsed a strategy for completing investigations by the end of 2004, all trial activities at first instance by the end of 2008 and all of its work in 2010. The President of the Security Council, *Statement*, ¶¶ 1, 3–4, *delivered to the Security Council*, U.N. Doc. S/PRST/2002/21 (July 23, 2002). Security Council Resolutions 1503 of 28 August 2003 and 1534 of 26 March 2004 affirmed the Completion Strategies. S.C. Res. 1503, pmb., ¶ 7, U.N. Doc. S/RES/1503 (Aug. 28, 2003); S.C. Res. 1534, pmb., ¶¶ 3–6, U.N. Doc. S/RES/1534 (Mar. 26, 2004).

9. S.C. Res. 935, ¶ 1, U.N. Doc. S/RES/935 (July 1, 1994).

10. S.C. Res. 955, ¶ 1, U.N. Doc. S/RES/955 (Nov. 8, 1994).

11. The Statute was adopted by Resolution 955 of 8 November 1994 and amended by Resolution 1165 of 30 April 1998, Resolution 1329 of 30 November 2000 and Resolution 1411 of 17 May 2002. *Id.*; S.C. Res. 1165, U.N. Doc. S/RES/91165 (Apr. 30, 1998); S.C. Res. 1329, U.N. Doc. S/RES/1329 (Dec. 5, 2000); S.C. Res. 1411, U.N. Doc. S/RES/1411 (May 17, 2002).

12. Rome Statute of the International Criminal Court arts. 5, 12, 13, July 17, 1998, 2187 U.N.T.S. 90, available at <http://www.un.org/law/icc/statute/romefra.htm> [hereinafter Rome Statute]. According to article 126 of the Rome Statute, the Statute "enter[s] into force on the first day of the month after the 60th day following the date of deposit of

mentary¹³ jurisdiction over genocide, crimes against humanity, and war crimes,¹⁴ when committed by nationals of a state party, or within the territory of a state party¹⁵ after 1 July 2002. In contrast with the ad hoc courts, the ICC is a permanent court, established by a multilateral treaty, and supported by the United Nations.

More recently, the Security Council adopted Resolution 1315 to address the massive and widespread violence caused by the civil war in Sierra Leone. Resolution 1315¹⁶ requested that the Secretary-General negotiate an agreement with the government of Sierra Leone to create an independent special court. In 2002, the agreement to establish the Special Court for Sierra Leone (SCSL) was signed, and Sierra Leone subsequently implemented the agreement via domestic legislation, effective 2002.¹⁷ The SCSL is mandated to try those who bear the greatest responsibility for serious violations of international humanitarian law, and specific Sierra Leonean laws, committed in the territory of Sierra Leone since 30 November 1996. The court has limited territorial jurisdiction and its *rationae temporis* is limited from above mentioned date to a future date to be decided by a subsequent agreement between the parties. According to its *rationae personae*, emphasis is placed on those who bear the greatest responsibility for international crimes. The SCSL is another ad hoc court of an internationalized character as it has both national and international judges.

The violent events leading to the independence of the island of East Timor after the occupation by Indonesia led to Security Council Resolution 1272, which established a transitional administration in East Timor

the 60th instrument of ratification, acceptance, approval or accession with the Secretary-General of the United Nations." *Id.* art. 126. On 11 April 2002, sixty such instruments were deposited.

13. The ICC may only exercise its jurisdiction when states (or the Security Council) refer cases to the court or when state parties are unwilling or unable to prosecute according to article 17. *Id.* art. 17.

14. *Id.* art. 5(1)(a-d). Besides these core crimes, "[t]he [ICC] shall exercise a [dormant] jurisdiction over the crime of aggression once a provision is adopted in accordance with articles 121 and 123 defining the crime and setting out the conditions under which the court shall exercise jurisdiction with respect to this crime." *Id.* art. 5(2).

15. *Id.* art. 12(2)(a). The competence of the ICC may be extended in cases where states have accepted the jurisdiction of the ICC, *id.* art. 12(3), when the case is referred to the prosecutor by a state party or the Security Council, *id.* art. 13(a-b), or where the defendant was tried by another court, but the proceedings were intended to shield the defendant, or were otherwise inconsistent with an intent to bring the person concerned to justice." *Id.* art. 20.

16. S.C. Res. 1315, ¶ 1, U.N. Doc. S/RES/1315 (Aug. 14, 2000).

17. The agreement between the United Nations and the Government of Sierra Leone was signed on 16 January 2002. Agreement between the United Nations and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone, app. II, Jan. 16, 2002, U.N. Doc. S/2002/246. The domestic implementing legislation was passed on 19 March 2002 and assented to by the President of Sierra Leone on 29 March 2002. Special Court Agreement, 2002 (Ratification Act), reprinted in CXXXIII SIERRA LEONE GAZETTE No. 22, at 2 (supp. Apr. 25, 2002), available at <http://www.sierra-leone.org/gazette.html>. On 16 April 2002, Sierra Leone and the United Nations exchanged the instruments that brought the Agreement into force.

(UNTAET).¹⁸ This administration instituted another type of an internationalized court: the Special Panels for Serious Crimes.¹⁹ These panels, composed of national and international judges, are a part of the domestic District Court in Dili, the capital of East Timor. The panels have exclusive jurisdiction over genocide, crimes against humanity, war crimes and some specific domestic crimes committed in East Timor between 1 January and 25 October 1999.²⁰ A remarkable feature of these panels is the application "*avant la lettre*" of the substantive law taken *verbatim* from the Statute of the International Criminal Court.

The internationalized Kosovo courts are another variation. These courts were established under the United Nations Interim Administration scheme in Kosovo (UNMIK),²¹ with a competence including international crimes. Panels consisting of a mixture of Kosovan and international judges operate within the Kosovan legal system,²² and hear cases arising from the internal conflict in the province of Kosovo between the Kosovan Albanians and the Serbs. The competences of the Kosovan panels do not, however, limit the ICTY's primary jurisdiction over international crimes related to the conflict in Kosovo. Finally, an internationalized extraordinary chamber may be established in the courts of Cambodia, with jurisdiction over international and other specific crimes committed by senior members of the Khmer Rouge regime in the period between 17 April 1975 and 6 January 1979.²³

18. S.C. Res. 1272, U.N. Doc. S/RES/1272 (Oct. 25, 1999).

19. Resolution 1272 mandated UNTAET to bring to justice those responsible for the violence surrounding the referendum (that led to independence). *Id.* art. 16. The Special Panels were established by UNTAET Regulation 2000/15 of 6 June 2000. UNTAET Reg. No. 2000/15, U.N. Doc. UNTAET/REG/2000/15 (June 6, 2000).

20. Parallel to this development, the Indonesian authorities established a tribunal to try cases arising from human rights violations in East Timor as an ad hoc part of the Jakarta District Court on 23 April 2001.

21. S.C. Res. 1244, U.N. Doc. S/RES/1244 (June 10, 1999) (establishing the United Nations Interim Administration Mission in Kosovo (UNMIK)).

22. UNMIK Regulations 2000/24, U.N. Doc. UNMIK/REG/2000/24 (Apr. 21, 2000), and 2000/59, U.N. Doc. UNMIK/REG/2000/59 (Oct. 27, 2000) complemented the Kosovan Criminal Code and the applicable criminal code of the Federal Republic of Yugoslavia with internationally recognized human rights standards.

23. The applicable Cambodian regulations became law on 10 August 2001. Law on the Establishment of the Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed during the Period of Democratic Kampuchea, Aug. 10, 2001, available at [http://www.cambodia.gov.kh/krt/pdfs/KR%20Law%20as%20promulgated%20\(Eng%20trans%206%20Sept%202001\).pdf](http://www.cambodia.gov.kh/krt/pdfs/KR%20Law%20as%20promulgated%20(Eng%20trans%206%20Sept%202001).pdf) (English translation). It seems that the discussions between the United Nations and the Cambodian Government to secure the participation of international judges and the applicability of certain legal standards and safeguards have been resolved. Agreement Between the United Nations and the Royal Government of Cambodia Concerning the Prosecution under Cambodian Law of Crimes Committed During the Period of Democratic Kampuchea, Oct. 19, 2004, available at <http://www.cambodia.gov.kh/krt/pdfs/Agreement%20between%20UN%20and%20RGC.pdf>.

B. Personal Jurisdiction

The jurisdiction of the courts discussed above is limited to individuals; they may not try states, nor their organizational organs or other legal entities. In classic international law, the general thrust of state responsibility is based on the establishment of impunity of the state for certain wrongs committed by its agents or organs. The first codifications of customary international law embodied the principle that the state, rather than the individual, is responsible for breaches of the law and customs of war. Subsequently, the focus of accountability for offences during an armed conflict shifted step by step to individuals and their role with respect to the offences. This shift resulted in the norm that all individuals are accountable for violations of humanitarian law, if committed or otherwise instituted or permitted by themselves or by others for whom they are responsible.

Modern individual criminal responsibility in international law includes both factual (individual) and functional responsibility. The common notion of individual responsibility takes as a starting point that a normal person is responsible for his own actions. Once individual responsibility is acknowledged under international law, the same notion is applied: a person, who participates in the planning, preparation or execution, or otherwise contributes to the commission of serious violations of international humanitarian law, should be held criminally responsible. And, indeed, the Nuremberg and Tokyo rulings²⁴ imposed responsibility upon individuals, in their personal capacity, for his involvement in the commission of human rights violations. As individual responsibility for common offences came to include accountability for functional responsibilities, the concept of criminal responsibility under international law expanded in the same way. Commanders and superiors are treated as perpetrators and accomplices when they have incited, allowed or failed to prevent crimes committed in the line of duty by their subordinates.

All special courts provide for different levels of individual criminal responsibility. In addition, heads of states, government officials, political leaders and (high-ranking) military leaders are held accountable for acts committed by lower ranking military and other persons acting under their orders or directions or for events influenced through their position of superior authority or failure to prevent such acts.

II. Functional Responsibility

The first recorded trial to hold a commander criminally responsible for murder and plunder by his troops dates back to 1474, when Peter von Hagenbach appeared before a tribunal of the Holy Roman Empire.²⁵ An early academic comment on command responsibility was made by the

24. ROBERT K. WÖTZEL, *THE NUREMBERG TRIALS IN INTERNATIONAL LAW* 19-20 (rev. ed., 1962).

25. GEORG SCHWARZENBERGER, *INTERNATIONAL LAW*, VOL. I, *INTERNATIONAL LAW AS APPLIED BY INTERNATIONAL COURTS* (1968).

great Dutch scholar Grotius,²⁶ who asserted that rulers might be held responsible for the crime of a subject if they knew it and did not prevent it when they had the opportunity to do so. During the same period, King Gustav of Sweden promulgated his "Articles of Military Lawwes to be Observed in the Warres,"²⁷ which provided that "[n]o Colonel or Captaine shall command his souldiers to do any unlawful thing; which who so does, shall be punished" More such documents were issued in European countries. In the United States, Articles of War were enacted in 1775, outlining the duties of military commanders during an armed conflict; these were followed in the nineteenth century by the famous Lieber Code of 1863.²⁸ In Europe, the Brussels Declaration of 1874,²⁹ and the Oxford Manual of the Laws and Customs of War of 1880,³⁰ formed the basis of the first and rudimentary Hague Convention Respecting the Laws and Customs of War by the turn of the century.

In the twentieth century, the 1907 Hague Convention Respecting the Laws and Customs of War and annexed Regulations provided more clearly the conditions that a combatant must fulfill to be accorded the rights of a lawful belligerent. The Hague Convention provides that a person responsible for his subordinates must command the armed forces of each state party. The responsibility of individuals, though limited to the military, was affirmed after World War I: for example, the Treaty of Versailles³¹ with regard to Germany, called for the trial of the Kaiser, the Supreme German Commander. That treaty provided, more generally, for the right of the Allied and Associated Powers to bring before military tribunals persons accused of having committed acts in violation of the laws and customs of war. However, no such military tribunals were formed and no accused individuals were prosecuted. The Treaty of Sèvres³² may also be men-

26. HUGO GROTIUS, *DE JURE BELLI AC PACIS* 523 (Francis W. Kelsey trans., Clarendon Press 1925).

27. William Hays Parks, *Command Responsibility for War Crimes*, 62 *MIL. L. REV.* 1, 5 (1973) (quoting article 46 of King Gustav's articles).

28. Francis Lieber, Instructions for the Government of the Armies of the United States in the Field, promulgated as Gen. Order No. 100 (Apr. 24, 1863) (Lieber Code), reprinted in *THE LAWS OF ARMED CONFLICTS* 3 (Dietrich Schindler & Jiri Tomas eds., 3d ed. 1988) (providing for punishment of a commander who ordered or encouraged the intentional wounding or killing of a "wholly disabled enemy" whether he was in the "Army of United States, or is an enemy captured after having committed his misdeed." *Id.* art. 71).

29. Project of an International Declaration Concerning the Laws and Customs of War, Aug. 27, 1874, 65 *Brit. Foreign & St. Papers* 1005 (1873-74).

30. INSTITUTE OF INTERNATIONAL LAW, *THE LAW OF WAR ON LAND* (adopted by the Institute of International Law at Oxford, Sept. 9, 1880).

31. Treaty of Peace Between the Allied and Associated Powers and Germany (Treaty of Versailles) arts. 227-28, June 28, 1919, 225 *CONSOL. T.S.* 188, 285, reproduced in 13 *AM. J. INT'L L.* No. 3, Supp.: Official Documents, 151 (July 1919) (demanding the trial of the Kaiser before an international tribunal, as well as demanding the trial of individuals who had violated the laws of war before international military tribunals).

32. Treaty of Peace Between the Allied and Associated Powers and Turkey (Treaty of Sèvres) art. 215(3), Aug. 10, 1920, 15 *AM. J. INT'L L.* 179, 231 (Supp 1921) (never ratified, superseded by the Treaty of Lausanne) ("The Turkish government undertakes . . . [t]o facilitate the establishing of criminal acts punishable by the penalties referred to in

tioned as it dealt, *inter alia*, with the responsibility of the "Young Turks" for the Armenian genocide. Again no trials were instituted.

Issues of functional responsibility—including that of civilians—were plentiful in the post-World War II prosecutions before the international military tribunals of Nuremberg and Tokyo. The Nuremberg Charter³³ made it utterly clear that the official position of an accused—be it commander or public official—would not exculpate an accused from responsibility for crimes under the Charter. For opportunistic reasons,³⁴ the Tokyo Charter³⁵ did not include heads of states. A broad scope of individual criminal responsibility was then incorporated into the Nuremberg Principles, which were prepared by the International Law Commission and affirmed by the General Assembly of the United Nations in 1950.³⁶ The principles were, in part, the inspiration for the statutes of the ICTY and the ICTR and for the statutory provisions of the ICC. The principles also played a role in national prosecutions—including those in the United States—for the My Lai killing during the Vietnam war;³⁷ in Israel when the Kahan Commission³⁸ investigated the invasion in Lebanon which led to massacres in the Palestinian refugee camps, Sabra and Shatilla; in Germany, in the case of Honneker,³⁹ and his successor Krenz;⁴⁰ and the Pinochet extradition case⁴¹ in the United Kingdom.

A. Command Responsibility

The applicable test for military commanders is that of culpability. National courts have set a number of tests, ranging from a failure to act to prevent the unlawful activity when the military commander "could have

Part VII (Penalties) of the present Treaty and committed by Turks against the persons of prisoners of war or Allied nationals during the war.").

33. Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis (Charter of the International Military Tribunal) arts. 6-7, Aug. 8, 1946, 59 Stat. 1544, 82 U.N.T.S. 280.

34. The Allied Forces yielded to the United States' insistence that Emperor Hirohito not be tried. See RICHARD H. MINEAR, *VICTORS' JUSTICE: THE TOKYO WAR CRIMES TRIAL* 110-17 (1971); see generally JAMES WEBB, *THE EMPEROR'S GENERAL* (1999).

35. Charter of the International Military Tribunal for the Far East art 6, Jan. 19, 1946, T.I.A.S. No. 1589, 4 Bevans 20 (1968).

36. G.A. Res. 488 (V), U.N. GAOR, 320th mtg., U.N. Doc. A/1775 (Dec. 12, 1950).

37. See Douglas O. Linder, *Famous Trials: An Introduction to the My Lai Court-Martial* (2005), <http://www.law.umkc.edu/faculty/projects/ftrials/mylai/mylai.htm>.

38. Linda A. Malone, *Kahan Report, Ariel Sharon and the Sabra-Shatilla Massacres in Lebanon: Responsibility Under International Law for Massacres of Civilian Populations*, 1985 UTAH L. REV. 373-374 (1985).

39. The trial of Honneker before the court of Moabit was stayed in 1992 because of the Defendant's unfitness to stand trial. Honneker died in Chile in 1994.

40. Bundesgerichtshof [BGH] [Federal Court of Justice] Nov. 8, 1999 45 BGHSt 270 (FRG) [Judgment]; aff'd on appeal, Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] Jan. 12, 2000, 2000 NJW 443 (FRG). Streletz, Kessler and Krenz v. Germany, Judgment, 2001-II Eur. Ct. H.R. 230 (March 22, 2001).

41. R. v. Bow St. Metro. Stipendiary Magistrate, *ex parte* Pinochet Ugarte, [2000] 1 A.C. 61 (H.L. 1998) (*Pinochet I*); R. v. Bow St. Metro. Stipendiary Magistrate, *ex parte* Pinochet Ugarte, [2000] 1 A.C. 119 (H.L. 1999) (*Pinochet II*); R. v. Bow St. Metro. Stipendiary Magistrate, *ex parte* Pinochet Ugarte, [2000] 1 A.C. 147 (H.L. 1999) (*Pinochet III*).

known," to those that require "actual knowledge." As an exception to the general standard, the international doctrine recognizes functional responsibility of military commanders by drawing the line where the commander "should have known"⁴² of the unlawful activity. This is clearly culpability based on negligence and not on *culpa in causa*. The military commander has a duty to take all necessary and reasonable measures within his power to prevent the commission of an unlawful act by subordinates under his command, and he also has an additional obligation to take all necessary and reasonable steps to keep himself sufficiently informed in order to be reasonably able to prevent unlawful acts of his subordinates. The Germans call this the principle of functional caution—"Garantenstellung"⁴³—as a superior has to warrant for the proper performance of his men, and should therefore do everything reasonable to make that possible. The statutes of the ICTY, ICTR, and ICC, take the matter further by including culpability when a superior fails to take necessary and reasonable measures to punish perpetrators or to submit the matter to the competent authorities for investigation and prosecution.⁴⁴ Here, the same test deriving from the *Garantenstellung* applies: The commander must take all necessary and reasonable measures within his power to repress the commission of unlawful acts.

Military standards should be high because of the need to preserve a standard of discipline in a military structure, which is concomitant with the superior's responsibility. The proper inquiry is whether command and control is exercised effectively, and this is clearly an evidentiary issue. Here, problems may arise when civilians are involved, as they may not have a pre-established function in a well-defined hierarchy in which command and control responsibilities are commensurate to rank. Civilians who are placed in such roles may drift in and out of the decision making process, raising questions about the permanence of their roles. In principle, however, command responsibility with military and paramilitary activity is the same for all persons in command, whether or not they are part of the military hierarchy. The difference is the legal and factual assumptions that apply to military personnel who are a part of a chain of command.

B. Superior Responsibility

Those who are not a part of the military or subject to its control do not fall under the command responsibility norms and standards, as just discussed. In this respect, the accelerated development of international law through the ICTY and ICTR has affected the functional responsibility doc-

42. For a discussion of policy issues, see M. CHERIF BASSIOUNI & P. MANIKAS, *THE LAW AND THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA* 345 (1996).

43. *Garantenstellung* is defined as an obligation to warrant a proper fulfillment of a function.

44. See Statute of the International Criminal Tribunal for the former Yugoslavia art. 7(3), May 25, 1993, 32 I.L.M. 1192 [hereinafter ICTY Statute]; Statute of the International Criminal Tribunal for Rwanda art. 6(3), Nov. 8, 1994, 33 I.L.M. 1598 [hereinafter ICTR Statute]; Rome Statute, *supra* note 12, art. 28(a)(ii), (b)(iii).

trine with respect to civilians. Civilians can be held responsible for the behavior of others when they are in a superior position to and able to control the behavior of the subordinate. Such superiors may work in a state hierarchical structure, be politicians, or leaders of commercial enterprises as well.

The Statutes of the ICTY and ICTR clearly established criminal responsibility for civilian superiors who act on a comparable footing with military command responsibility. The common test is to apply the criteria of knowledge or awareness; power or authority; and acceptance or negligence. The case law deriving therefrom refined that accountability further into a mature system of criminal responsibility, as reflected in the present statute of the ICC. Those who have the ability to influence events through their positions of superior authority should be brought to justice,⁴⁵ as responsibility may also arise by the virtue of a position of authority when failing to prevent such crimes.⁴⁶ During the drafting process of the Rome Statute, the point was raised whether civilian superior responsibility would incur the same degree of responsibility as that of military commanders, and whether civilian superiors would be in the same position as military commanders to prevent or repress the commission of crimes by their subordinates and punish perpetrators. Article 28 of the Rome Statute addresses the issue by separating both responsibilities in two different paragraphs. The military paragraph provides for an extra test of "should-have-known" and the civilian one without such test.

III. From Impunity to Accountability

Dictators and other "strong men" who negate the rule of law, and create a platform for oppression, torture, or other violations of international humanitarian law, are often either killed after a regime change, or negotiate a way out and leave the country. Others secure their impunity through all kinds of legal arrangements—sometimes of a constitutional nature—before they step down. This is why national courts in South America have been put on the sidelines for so many years, despite the fact that prosecutors would have classically the competence to prosecute because of the nationality of the perpetrator or the *locus delicti*. The character of violations of humanitarian law makes such crimes a universal matter, regardless nationality and location. Consequently, individual responsibility for violations of humanitarian law has become a global issue and the shift of focus from state responsibility to individual responsibility would become meaningless when individuals would hide away behind the sovereignty of the state. The

45. See, e.g., Prosecutor v. Karadzic, Mladic, Case Nos. IT-95-5-R61, IT-95-18-R61, Review of the Indictments Pursuant to Rule 61 of the Rules of Procedure and Evidence, ¶¶ 41, 65, 74, 79, 81–83 (July 11, 1996). Karadžić, the President at the Bosnian Serb Administration, and Mladić, the commander of the Bosnian Serb Army, were indicted for violations of international humanitarian law committed by Bosnian Serb Administration forces.

46. Prosecutor v. Nikolic, Case No. IT-94-2-R61, Review of Indictment Pursuant to Rule 61 of the Rules of Procedure and Evidence, ¶ 24 (Oct. 20, 1995).

trend in international law is to rule out all barriers that would allow any form of impunity for violations of humanitarian law. Indeed, times are changing, and dictators will not escape liability as easily anymore.

A. Immunity

Historically, functional immunity of government leaders, ministers of foreign affairs and heads of state has been firmly established in international law, and reflected in international treaties such as the Vienna Convention.⁴⁷ For incumbent functionaries, the issue of immunity affects the *ratione personae*, and, for former functionaries, the *ratione materiae*. It is consistent that national courts should respect both kinds of immunities for domestic crimes. The present international instruments, however, such as the Vienna Convention, do not specifically address the responsibility of the protected persons for violations of humanitarian law. Since international crimes are no longer solely a matter for international or internationalized courts, domestic courts may have to deal with the issue of immunities with respect to international crimes as well. In the Pinochet case,⁴⁸ the Law Lords denied immunity *ratione materiae*, as at the time of the extradition request Pinochet was a former head of state. On an international level, the Nuremberg Charter, the statutes of the ICTY, ICTR and SCSL and the Rome Statute deny any immunity. The scope on criminal responsibility for violations of humanitarian law in international prosecutions is therefore absolute,⁴⁹ in support of the principle that heinous crimes ought not to go unpunished.

The immunity of acting dignitaries before a national court was an issue in a dispute between the Democratic Republic of Congo and the Kingdom of Belgium,⁵⁰ which was litigated before the International Court of Justice (ICJ). Belgian residents, most having Belgian nationality, filed claims alleging war crimes and crimes against humanity in an ordinary court in Brussels, which issued an arrest warrant for the incumbent Minister for Foreign Affairs of the Congo. The jurisdiction of the court was not based on the principle of nationality or territoriality, as the alleged facts were committed outside of Belgium, but on universal jurisdiction for serious violation of international humanitarian law.⁵¹ The ICJ ruled that Belgium had violated its legal obligations to respect the immunity from

47. Vienna Convention on the Law of Treaties, May 23, 1969, 1155 U.N.T.S. 331, 8 I.L.M. 679.

48. See *Pinochet*, *supra* note 41.

49. The theoretical exception might be based on the age of the accused (i.e. excluding minors).

50. Case Concerning the Arrest Warrant of 11 April 2000 (D.R.C. v. Belg.), 2002 I.C.J. 21 (Feb. 14) [hereinafter *DRC*].

51. The applicable provisions of Belgian Law are codified under the Law of 16 June 1993 "concerning the Punishment of Grave Breaches of the International Geneva Conventions of 12 August 1949 and of Protocols I and II of 8 June 1977 additional thereto" as amended by Law of 19 February 1999 "concerning the Punishment of Serious Violations of International Humanitarian Law." Article 7 provides that "[t]he Belgian courts shall have jurisdiction in respect of the offences provided for in the present Law, where-soever they may have been committed."

criminal jurisdiction and the inviolability that the incumbent minister enjoyed under international law. The court held that an incumbent minister for Foreign Affairs enjoys immunity and that the fact that the minister is charged with war crimes and crimes against humanity did not constitute an exception to that rule. The court observed that the immunity from jurisdiction enjoyed by incumbent ministers for Foreign Affairs does not mean that they enjoy impunity in respect of any crimes they might have committed, irrespective of their gravity. The court then enumerated four situations in which immunity and impunity do not go together: (a) Ministers can be subject to proceedings in their own countries, when they do not enjoy immunity under international law, (b) they can be tried by foreign national courts if their own state waives their immunity, (c) when out of office they will no longer enjoy immunity for acts committed prior or subsequent to their period of office nor for acts committed in office though in a private capacity, and (d) they can be tried by *certain* international courts.

B. State Practice and International Cases

As indicated in the introduction of this article, leaders are inclined to attack the authority to prosecute them, where possible. This is especially true when the charges relate to violations of international humanitarian law. Challenges were unsuccessful in the trials of Honneker, the former leader of the German Democratic Republic and his successor Krenz,⁵² before courts in Germany, as they were no longer in office at the time of trial. General Pinochet, the former dictator of Chile, raised the issue of his immunity in the extradition case⁵³ in the United Kingdom, but as mentioned above, failed for the same reason. Colonel Qadhafi was more successful in pretrial proceedings before a French court with respect to his alleged involvement of the bombing of an aircraft over Niger in September 1989, in which 170 persons, including French citizens, were killed. The French Supreme Court reversed the approval to institute criminal investigations against Qadhafi because of his status as current Head of State of Libya, and held that Qadhafi enjoyed immunity from criminal suit for that reason.⁵⁴

Other examples include the decision of the French authorities to arrest Ely Ould Dah, a Mauritanian colonel, for allegedly torturing suspected coup plotters in his country in the early 1990's.⁵⁵ Similarly, when Portuguese lawyers started seeking support to try Suharto, the former President of Indonesia, for the murder of thousands of civilians in East Timor; his trip to Germany was cancelled. Izzat Ibrahim al-Duri, a high-ranking official of Saddam Hussein's government in Iraq, made a cursory exit from Austria when a complaint was filed for his alleged role in the mass murder

52. See *supra* notes 39 and 40.

53. See *Pinochet*, *supra* note 41.

54. Chambre Criminelle [Cass. Crim.] [French Supreme Court, Criminal Division] Paris, Arrêt n° 1414, Mar. 13, 2001, Gaz. Pal. [2001], 2, *somm.*

55. See Terence Neilan, *World Briefing: France, Maruitania: Military Freeze*, N.Y. TIMES, July 7, 1999, at A4.

of Kurds in 1988.⁵⁶ In July 2001, the Israeli Prime Minister Sharon cancelled a flight to Brussels because a lawsuit had been filed on the basis of his alleged role in the massacre of Palestinian refugees in Lebanon. In 1989, the United States invaded Panama, arrested de facto leader General Manuel Noriega, and brought him to the United States to stand trial on charges of racketeering, money laundering, and drug trafficking. In April 1992, he was convicted and sentenced to forty years in prison. Hissen Habré, the former president of Chad, was arrested on charges of mass killings and torture by the Senegalese authorities. After a regime change, the Senegal Supreme Court held that the Senegal courts lacked jurisdiction and Habré was released in 2000.⁵⁷

The first senior state official prosecuted before an international tribunal after Nuremberg⁵⁸ was the former Prime Minister of Rwanda, Jean Kambanda, for his role in the genocide that occurred in Rwanda in 1994. He entered a guilty plea, accepted the jurisdiction of the court, and was convicted by the ICTR in 1998.⁵⁹

A year later, in 1999, the prosecutor of the ICTY indicted Slobodan Milošević while he was President of the Federal Republic of Yugoslavia.⁶⁰ After Milošević had stepped down from office,⁶¹ the new Yugoslav government surrendered him to the ICTY in The Hague. At his initial appearance before the Trial Chamber, Milošević spoke to the judges of the ICTY, stating: "*I consider this Tribunal a false Tribunal and the indictment a false indictment*" He later repeated this "famous" one-liner: "[this] is a *false Tribunal . . . an illegitimate one.*"⁶² To rule out any misunderstanding, Milošević later filed a motion in which he unequivocally raised the issue of his immunity, by arguing that "the Tribunal is illegal and lacks all jurisdiction, including subject matter jurisdiction and jurisdiction over his person

56. All three events were reported in *World Briefing*, WASH. POST, Aug. 19, 1999, at A13.

57. Cour de Cassation du Sénégal (Première chambre statuant en matière pénale), Aff. Habre, Arrêt n° 14, Mar. 20, 2001.

58. The highest State official prosecuted before the Nuremberg Tribunal was *Großadmiral Karl Dönitz*, successor of Adolf Hitler for the period of 2 May 1945 to the collapse of Nazi Germany. See TRIAL OF THE MAJOR WAR CRIMINALS BEFORE THE INTERNATIONAL MILITARY TRIBUNAL 78, 310, 315, 337 (1947).

59. Prosecutor v. Kambanda, Case No. ICTR-97-23, Judgment and Sentence (Sept. 4, 1998) (ICTR Trial Chamber). Later Kambanda revoked his plea, but in appeals the conviction was not reversed. Prosecutor v. Kambanda, Case No. ICTR-97-23, Judgment (Oct. 19, 2000) (ICTR Appeals Chamber).

60. The ICTY Statute created personal jurisdiction for heads of states as well in article 7(2) reading: "The official position of any accused person, whether as Head of State or Government or as a responsible Government official, shall not prevent such person of criminal responsibility nor mitigate punishment." ICTY Statute, *supra* note 44, art. 7(2). The ICTR Statute has the same provision in article 6(2). ICTR Statute, *supra* note 44, art. 6(2).

61. After the corrupt September elections, Milošević's downfall was a fact by 5 October 2000. See, e.g. Steven Erlanger, *Showdown in Yugoslavia: Yugoslavs Claim Belgrade for New Leader*, N.Y. TIMES, Oct. 6, 2000, at A1.

62. Prosecutor v. Milošević, Case No. IT-99-37, Transcript (July 3, 2001), at p.2, lines 3-6 and p.4, lines 1-3, available at <http://www.un.org/icty/transe54/0107031A.htm> [hereinafter Transcript].

and the indictment issued against him is void and a nullity.”⁶³ The reasoning for the argument demonstrates the way Milošević operates, which is the reason why it is quoted here in its entirety:

(1) The United Nations lacks authority and power under the Charter of the United Nations and other instruments under which it was created to establish an international criminal court of any kind and especially one that is selectively and politically limited in its powers and purposes as this tribunal is limited but which claims power to compel the surrender of individuals by sovereign nations and to try them for alleged crimes and if convicted to sentence them to life in prison, that has no legal basis and violates fundamental principles of international law.

(2) The Security Council has no authority or power to establish this Tribunal both because the United Nations Charter confers no power on the Security Council to do so and because the United Nations itself and the Security Council lack inherent authority and power to do so as set forth above.

(3) The Criminal Tribunal for the former Yugoslavia corrupts justice and law among nations and individuals or within the former nation that has been targeted for Prosecution.

(4) By reason of the illegitimacy of its creation, the selective and political nature of its powers and purposes as well the inherent and inescapable weaknesses in structure, administration and operations of an ad hoc Tribunal created as this one has created, the Tribunal lacks power and independence and is incapable of protecting fundamental human rights and providing due process of law and fundamental fairness in all of its functions and operations, including without limitation, the issuance of indictments, assuring access to all relevant evidence for both Prosecution and defence to assure accuracy and truth in the fact finding process and fairness in the trial of cases, and in the protection of witnesses and prisoners.

(5) The Tribunal does not have jurisdiction over the person of President Milosevic because he was surrendered in violation of the constitution of the Federal Republic of Yugoslavia, the constitution of the Republic of Serbia and the Statute which created the International Criminal Tribunal for the Former Yugoslavia.⁶⁴

The arguments related to the establishment of the ICTY echoed the

63. The motion, named “Preliminary Protective Motion” was filed on 9 August 2001. Milošević signed the motion and added in his own handwriting: “I submit this *paragraf* [sic] 8 (eight) only. The preceding paragraphs are placed to explain the situation.” [hereinafter Preliminary Protective Motion] Later Milošević denied in a handwritten letter to the Registrar of 24 August 2001 that he ever filed a motion, because the “*paper dispatched to the Registrar on 9 August 2001*” was no more than a reminder to the Registrar of his obligation “to release Milošević from prison immediately.” On 16 August 2001, the prosecution filed a response to the motion; the accused tried to table the issue at the Status Conference of 30 August 2001 and filed a document “Presentation on the illegality of the so-called International Criminal Tribunal for the former Yugoslavia” the same day. The prosecution responded to this presentation on 13 September 2001; the amici curiae filed a brief on jurisdiction on 19 October 2001 and finally the prosecution responded to the amicus brief on 26 October 2001.

64. Preliminary Protective Motion, *supra* note 63, para. 8. The contents were further elaborated and extended by Milošević in the document of 30 August 2001, “Presentation on the illegality of the so-called International Criminal Tribunal for the former Yugoslavia.” See *supra* note 63.

preliminary debate in the Tadić case⁶⁵ and ignored the case law developed since then.⁶⁶ The *amici curiae* clarified a number of issues raised by the accused—including immunity—and added a new element to the discussion of jurisdiction. They suggested that the Trial Chamber should seek—either through the ICTY, as a subsidiary organ of the Security Council, or through that council itself—an advisory opinion of the ICJ pursuant to article 65 of the ICJ Statute and article 96 of the U.N. Charter on the issue of jurisdiction. The Trial Chamber refused to seek an advisory opinion and dismissed the claims of Milošević in a robust decision⁶⁷ and that settled the matter; the accused filed no appeal.

In 2003, the prosecutor of the SCSL indicted Charles Taylor, who was at that time the president of the Republic of Liberia. Taylor, who was abroad at the time, traveled back to Liberia when the SCSL issued an international arrest warrant.⁶⁸ The arrest warrant immobilized Taylor, and Liberia was motivated to file a complaint against Sierra Leone with the International Court of Justice for violating the immunity of its head of state by Sierra Leone. Liberia, referring to the Case Concerning the Arrest Warrant of 11 April 2000 before the ICJ, argued that the SCSL is not an international court that would warrant an exception to the immunity of its president.⁶⁹ The SCSL was established by a negotiated agreement between the government of Sierra Leone and the Secretary-General of the United Nations, which was subsequently ratified by the parliament of Sierra Leone, followed by the assent of the President of that state. The SCSL is a part of the judicial authority operating within the Republic of Sierra Leone, but it cannot impose legal obligations on states that are not a party to the agreement between Sierra Leone and the United Nations. This in contrast to international courts, such as the ICTY and ICTR, which were established by the power of the U.N. Security Council acting under Chapter VII of the U.N. Charter. Unlike the ICC—an international court established by the majority of the members of the U.N. General Assembly—the SCSL Statute does not provide for the possibility of Security Council referral of a situation for investigation, prosecution and trial to the SCSL. Whereas the Republic of Sierra Leone did not accept the jurisdiction of the ICJ pursuant to article 36(2) of the ICJ Statute, the filing did not result in any litigation. In 2003, Taylor filed—“under protest and without waiving of immunity”—a motion with the Special Court for Sierra Leone to squash the indictment

65. Prosecutor v. Tadic, Case No. IT-94-1, Decision on the Defense Motion on Jurisdiction (Aug. 10, 1995) (Trial Chamber I).

66. Prosecutor v. Tadic, Case No. IT-94-1, Decision on the Defense Motion for Interlocutory Appeal on Jurisdiction (Oct. 2, 1995) (Appeals Chamber). *See also* Prosecutor v. Kanyabashi, Case No. ICTR-96-15-T, Decision on the Defense Motion on Jurisdiction (June 18, 1997) (Trial Chamber); Prosecutor v. Karemera, Case No. ICTR-98-44, Decision on the Defense Motion Pursuant to Rule 72 (Apr. 25, 2001) (Trial Chamber).

67. Prosecutor v. Milosevic, Case No. IT-99-37, Decision on Preliminary Motions (Nov. 8, 2001) (Trial Chamber I).

68. Prosecutor v. Taylor, Case No. SCSL-03-01-I-001, Indictment (Mar. 7, 2003); Prosecutor v. Taylor, Case No. SCSL-03-01-I-003, Decision Approving Indictment and Order for Non-Disclosure (Mar. 7, 2003).

69. *See DRC, supra* note 50.

and declare the arrest warrant null and void.⁷⁰ As the motion raised the issue of immunity, it was referred⁷¹ to the Appeals Chamber, who issued their decision on 31 May 2004.⁷² It is noted that Article 6(2) of the SCSL Statute is taken *verbatim* from Article 6(2) of the ICTR Statute (which is the same as article 7((2) of the ICTY Statute),⁷³ and provides for criminal responsibility of heads of states. In its decision, the Appeals Chamber inspects its own legal basis and status and argues that it was established by an agreement between all members of the United Nations and Sierra Leone, and that fact makes the agreement an expression of the will of the international community. The judges conclude that circumstances surrounding the establishment of the SCSL rendered it truly international. That finding fit well with the ICJ ruling in the Congo-Belgium case,⁷⁴ and consequently, the Appeals Chamber rejected Taylor's immunity claim and dismissed the defense's motion. At this moment, Charles Taylor is in Nigeria because the president of that country granted him asylum. Nigeria may possibly change its mind about sheltering Taylor—for example, after a regime change—but for the time being, that country is a safe haven for Taylor, especially because there is no extradition treaty between Sierra Leone and Nigeria. As long as Taylor stays out of Sierra Leone and Nigeria does not surrender him to the SCSL, he cannot be tried in absentia.⁷⁵ Consequently, the case is still pending, awaiting the surrender of the defendant.

It is very likely that Saddam Hussein will contest the competence of the Iraqi Special Tribunal to try him, and attempt to invoke immunity for acts during his presidency. His lawyers may elaborate on the Congo-Belgium ruling of the ICJ, where the court held that state officials no longer in office will not enjoy immunity for acts committed prior or subsequent to their period of office, nor for acts committed in office though in a private capacity.⁷⁶ Moreover, they may well argue that the head of state is immune under the Iraqi Constitution as it stood at the time, claiming the present constitutional instruments⁷⁷ null and void as being promulgated

70. Prosecutor v. Taylor, Case No. SCSL-2003-01-1, Defense Motion to quash the Indictment (Jul. 3, 2003). The Prosecution responded on 28 July 2003, and the Defense replied on 30 July 2003.

71. Prosecutor v. Taylor, Case No. SCSL-2003-01-1, Referral (Sept. 19, 2003) (Trial Chamber 1). The defense and the prosecution filed further submission on 1 October 2003, 14 October 2003 and 11 November 2003. Amici curiae briefs were filed on 23 and 28 October 2003. After hearings on 31 October and 1 November, post-hearing submissions were filed on 12 and 21 November 2003.

72. Prosecutor v. Taylor, Case No. SCSL-2003-01-I, Decision on Immunity from Jurisdiction (May 31, 2004).

73. See ICTR Statute, *supra* note 60, art: 6(2).

74. See DRC, *supra* note 50.

75. See Statute of the Special Court for Sierra Leone, art. 17(4)(d), Aug. 14, 2000, U.N. Doc. 5/2002/246 (providing that the accused is entitled—as a minimum guarantee—to be tried in his presence).

76. See DRC, *supra* note 50.

77. For example, the Iraq Interim Constitution of 2004, established by the Coalition Provisional Authority (CPA), contains provisions confirming the Iraqi Special Tribunal Statute and its jurisdiction and penalties in Article 48; in addition, Article 26 the Consti-

by foreign occupational powers in violation of the Fourth Geneva Convention⁷⁸ or by an illegal government. However, as the Iraqi Special Tribunal Statute ("IST Statute") compels it to recognize international standards in applying Iraqi law, the judges will recognize the international trend—affirmed in above-mentioned case law—to rule out all barriers that would allow any form of impunity for violations of international humanitarian law. Moreover, the IST is a national court with Iraqi judges who are aware that new democratic Iraq must come to terms with the gruesome history of the Saddam Hussein regime. For all these reason, it seems that a defense of immunity is unlikely to succeed.

IV. Trial Issues

Defense counsels do not like uncertainties. So the first thing they do is analyze the procedural system at hand in order to be sure they understand all aspects of it; discover the loopholes; find the best routes; and avoid dead legal alleys. In domestic cases, this is not a serious issue because it is usually a learning process at the start of a legal career. When accepting a case before an international (or internationalized) court, defense counsel will be confronted with procedural law he is not familiar with. In most cases, the procedural law reflects a novel system, which is an amalgam of elements of accusatory and inquisitory legal systems. On their face, most of these trials may look like common law trials, but on a number of issues they are not. There is no jury, and therefore the role of the judge is different: they are engaged with "establishing the truth," as they have to judge the heart of the matter—is the accused guilty or not. The judges consequently take an active part in the proceedings; are not driven by the parties, but direct the format and the extent of the trial; control the number of witnesses; examine them to a certain extent; accept hearsay, let evidence and exhibits come in; and rule about matters of admissibility later. In sum, the way evidence is processed differs from the usual trial experiences in an Anglo-Saxon setting.

A. Legal Representation, the Milošević Trial

Heads of state and other people in powerful positions are used to running their affairs the way they want. Powerful people in countries without a proper functioning democracy—those in totalitarian systems—are not used to being subjected to the power of others. Warlords, chiefs, and dictators in these circumstances develop an attitude that underscores the "survival

tution provides that the law of the CPA will remain in effect until it is rescinded or amended. AL-DUSTER AL-MO'AKAT [Interim Constitution] (2004) (Iraq), available at <http://www.cpa-iraq.org/government/TAL.html>.

78. See Fourth Geneva Convention Relative to the protection of Civilian Persons in Time of War arts. 64–68, opened for signature Aug. 12, 1949, 6 U.S.T. 3316, 74 U.N.T.S. 287; Convention (IV) Respecting the Laws and Customs of War on Land art. 43, Oct. 18, 1907, 36 Stat. 2277 (embodying the limitations that the international law of occupation places on the authority of an occupying power, especially with respect to political and legal institutions of the state).

of the fittest.” There is no reason to believe their reactions will be different when they are prosecuted. One challenge Hussein faces is the temptation to either to defend himself without the assistance of defense counsel or, when accepting such assistance, to disregard professional advice and, in fact, try to run the defense. Experiences of this kind are not encouraging, as can be observed in the Milošević and Seselj cases.⁷⁹ Both defendants refused any legal representation and pester the proceedings.

Milošević told the Trial Chamber at his initial appearance, as quoted, that he considered the tribunal to be illegal, and concluded “so I have no need to appoint counsel to illegal organ.”⁸⁰ This changed the usual scenario and the judges had to consider what the consequences of the attitude might be. Trial procedures are usually composed on a balanced mix of the responsibility of the judges for an expeditious and fair trial, and the competent performance of staff, prosecutors and defense counsel. All systems are vulnerable to imbalances when one of the participants malfunctions. The refusal of Milošević to accept any form of legal representation and his firm wish to defend himself in person increased risk of error during the trial. The judges decided, in the interest of securing a fair trial, to appoint three counsels to appear before the court as *amicus curiae* to assist the Trial Chamber. The judges charged the amici with the duty of making any available submission or objection; and of cross-examining witnesses; drawing the attention to any (self) defenses; exculpatory of mitigating evidence; and any other action required in order to secure a fair trial, including identifying witnesses whom the Trial Chamber may itself wish to call.⁸¹ Milošević’s reaction to the appointment was ambivalent, as he may have appreciated the advantages of being assisted without being responsible for it. On the other hand, the amici’s duty to cross-examine witnesses would limit his room to maneuver, unless he conferred with them about conceptual and strategic issues. In any case, Milošević decided not to communicate with the amici, as he may have thought it would allow him to be consistently “politically correct.”⁸² The pattern over the years consists of the neutral ignorance of the amici, contrasted with Milošević’s persistent attacks on the prosecution, and the occasional dismay of the judges.

At the first Status Conference in August 2001, the prosecution suggested that the court assign a defense counsel for the accused, in addition to the *amicus curiae*. The Trial Chamber rejected this proposal, stating that the accused has a right to counsel, but he also has a right not to have counsel. A few months after the beginning of the trial,⁸³ Milošević identified the lawyers Zdenko Tomanovic and Dragoslav Ognjanovic as associates with whom he wished to communicate. The judges accepted that it

79. Prosecutor v. Seselj, Case No. IT-03-67. In 2005 alone, the Trial Chamber had issued seventeen decisions in response to motions by the accused.

80. See Transcript, *supra* note 62, at 2, line 5.

81. Prosecutor v. Milosevic, Case No. IT-99-37, Order (Aug. 30, 2001; amended Oct. 30, 2001 & Jan. 11, 2002) (Trial Chamber I).

82. Milošević may also have considered the fact that videotapes of the hearings were broadcast in the former Yugoslavia, offering a platform for political views.

83. The Trial began on 14 February 2002.

would be in the interest of a fair trial for the accused to meet with and be able to communicate freely with persons for legal advice, and to be able to discuss and supply them with copies of documents subject to non-disclosure to third parties.⁸⁴ This assistance improved Milošević's professional performance in the courtroom.

But by the end of that year, the prosecution raised the issue again and moved for assignment of counsel to the accused.⁸⁵ Milošević accused the prosecution of "*trying to take away my right to speak here.*" When the Trial Chamber asked whether it would not be sensible for his legal associates to sit in court and assist him, he replied that he did not need his legal associates with him in court. The amici curiae pointed out that a mandatory provision of defense counsel is drawn from inquisitorial systems, where the functions of defense counsel in a trial are very different from those in the adversarial form of trial adopted at the ICTY. For instance, the obligation of "putting a case"—which is required of the defense in the adversarial system—is impossible for an advocate to achieve without instructions from the accused as to the nature of the defense. The Trial Chamber agreed with this view and rejected the motion.⁸⁶ The judges found a concurring opinion in the ruling of the U.S. Supreme Court in *Faretta v. California*, which concerned the question of whether a defendant in a state criminal trial has a right, under the U.S. Constitution, to proceed without counsel when he voluntarily and intelligently elects to do so.⁸⁷

84. Prosecutor v. Milosevic, Case No. IT-99-37, Order (Apr. 16, 2002) (Trial Chamber).

85. Prosecutor v. Milosevic, Case No. IT-99-37, Submission from the Office of the Prosecutor on the Future Conduct of the Case in the Light of the State of the Accused's Health and the Length and Complexity of the Case (Nov. 8, 2002) (proposing that the Trial Chamber appoint defence counsel for the accused).

86. Prosecutor v. Milosevic, Case No. IT-99-37, Decision on the Prosecution Motion Concerning Assignment of Counsel (Apr. 4, 2003) (Trial Chamber I).

87. 422 U.S. 806 (1975). The U.S. Supreme Court noted that:

This Court's past recognition of the right of self-representation, the federal-court authority holding the right to be of constitutional dimension, and the state constitutions pointing to the right's fundamental nature form a consensus not easily ignored. . . . We confront here a nearly universal conviction, on the part of our people as well as our courts, that forcing a lawyer upon an unwilling defendant is contrary to his basic right to defend himself if he truly wants to do so.

Id. at 817. The Court found that:

The language and spirit of the Sixth Amendment contemplate that counsel, like the other defense tools guaranteed by the Amendment, shall be an aid to a willing defendant—not an organ of the State interposed between an unwilling defendant and his right to defend himself personally. To thrust counsel upon the accused, against his considered wish, thus violates the logic of the Amendment. In such a case, counsel is not an assistant, but a master, and the right to make a defense is stripped of the personal character upon which the Amendment insists.

Id. at 819. The Court thus concluded that the Sixth Amendment, when naturally read, implies a right of self-representation, and noted that this reading is reinforced by the Amendment's roots in English legal history. The Court noted that with the exception of the practice of the Star Chamber, the right to self-representation in England predates the right to legal counsel in serious crime cases. *Id.* at 821. The Supreme Court also said:

There are also practical reasons for not appointing defense counsel to Milošević. If such counsel were appointed, the Trial Chamber would have to take one of two courses: should Milošević refuse to instruct him or her, the Trial Chamber could either: (a) not allow Milošević to make submissions and question witnesses, thereby effectively preventing him from putting forward any defense; or, (b) it could allow him to make submissions and question witnesses, in which case, the defense counsel could do no more than the *amici curiae*.

One month later, Trial Chamber II in *Seselj* took a different route. These judges appointed standby counsel to assist *Seselj* in the preparation of his case for trial; to be present in the court room; to address the court whenever so requested by *Seselj*; and to put questions to witnesses if so ordered by the Trial Chamber, without depriving *Seselj* of his right to control the content of the examination. In addition, counsel would take over the defense from *Seselj* at trial, if the judges found that he was engaging in disruptive conduct.⁸⁸ The judges noted that in the *Barayagwiza* proceedings,⁸⁹ the Trial Chamber of the ICTR had appointed standby counsel after the accused had merely boycotted the trial and obstructed the course of justice. The composition of the Trial Chamber II in the *Seselj* case differed from the composition of the Trial Chamber I in the Milošević case. Trial Chamber I had stronger roots in common law jurisdictions, and had put greater emphasis on the interests of the accused than the character of the proceedings. Trial Chamber II had more ties with civil law jurisdictions: one reason why these judges took more guiding from European continental case law and put more emphasis on the interests of justice.

In February 2004, the prosecution's case came to an end, resulting in a scheduling order for Milošević to begin the defense's case in June 2004.⁹⁰ This caused some opposition from Milošević, who requested more time for preparation because of his illness. From this point on, the Trial Chamber—whose composition had changed after the sudden death of the presiding judge Sir Richard May—departed from its previous policy and ordered the prosecution to file submissions on the role of assigned counsel.⁹¹ The judges were to accept a different course, as they indeed did in September

It is undeniable that in most criminal prosecutions defendants could better defend with counsel's guidance than by their own unskilled efforts. But where the defendant will not voluntarily accept representation by counsel, the potential advantage of a lawyer's training and experience can be realized, if at all, only imperfectly. To force a lawyer on a defendant can only lead him to believe that the law contrives against him.

Id. at 834.

88. Prosecutor v. *Seselj*, Case No. IT-03-67, Decision on Prosecution's Motion for Order appointing Counsel to assist Voislav *Seselj* with his defense (May 9, 2003) (Trial Chamber II).

89. Prosecutor v. *Barayagwiza*, Case No. ICTR-97-19, Decision on Defense Counsel Motion to Withdraw (Nov. 2, 2000) (Trial Chamber).

90. Prosecutor v. *Milosevic*, Case No. IT-99-37, Decision on the Completion of the Prosecution Case (Feb. 25, 2004) (Trial Chamber I).

91. Prosecutor v. *Milosevic*, Case No. IT-99-37, Further Order on Future Conduct of the Trial (July 19, 2004) (Trial Chamber I).

2004, by assigning counsel to Milošević.⁹² The primary reason for this change of heart was clearly the weak health of Milošević, and the disruptive effect of his illness on the course of the trial, as well as the fear that it would cripple the fairness of the trial itself. One of the amici accepted the appointment but Milošević opposed it furiously; it resulted in pandemonium. After assigned counsel appealed the decision of the Trial Chamber, and Milošević filed a disciplinary complaint against counsel, the Trial Chamber had to reverse the order of cross-examination. However, the Appeals Chamber dismissed the assigned counsel's appeal, and denied his request to be relieved of his duties. The present situation is curious as Milošević does not communicate with counsel; counsel is not instructed; and Milošević wants to cross-examine witnesses himself. The assignment of counsel did not, in fact, improve the situation; on the contrary, it seemed the performance of an *amicus curiae* could not compensate for the malfunctioning of the role of the defence.

The Milošević trial seems to linger on since it started more than three years ago. There a number of reasons for this snail's pace. An important factor is, of course, the weak health of the accused. As Milošević wants to defend himself, hearings must be adjourned when he is ill. This situation has not been effectively remedied by the assignment of counsel to him. Secondly, the prosecution's desire to have the three indictments joined has slowed the proceeding down. The prosecution has spent too much time on matters of crime base rather than criminal responsibility, although that changed for better in a later stage of the prosecution's case. The judges had to cut down vast numbers of witness on both sides.⁹³ The examination of witnesses is very time consuming as Milošević insists on cross-examining every witness himself. It took some time for Milošević's examination skills to improve. The amici have taken a part in cross-examinations as well. Finally, too much time is spent on technical issues related to issues of legal representation.

B. Expectations, the Saddam Hussein Trial

The Administrator of the Coalition Provisional Authority (CPA)⁹⁴ authorized the Governing Council to establish an Iraqi Special Tribunal.⁹⁵ Acting upon this delegation, the Governing Council established the IST

92. Prosecutor v. Milosevic, Case No. IT-99-37, Reasons for Decision on Assignment of Defense Counsel (Sept. 22, 2004) (Trial chamber I).

93. Prosecution indicated initially almost 1000 witnesses, Milošević released the names of 1631 people he wants to call as witnesses.

94. Coalition Provisional Authority Regulation Number 1, § 1(1) and 1(2), stipulated that "[t]he CPA shall exercise powers of government temporarily . . ." over Iraq and that the CPA Administrator shall exercise the authority. Coalition Provisional Authority, Iraq, Regulation No. 1 (May 16, 2003), available at http://www.iraqcoalition.org/regulations/20030516_CPAREG_1_The_Coalition_Provisional_Authority_.pdf. Paul Bremer III was appointed to be the CPA Administrator.

95. Paul Bremer, III, Administrator, Coalition Provisional Authority, Iraq, Order No. 48, Delegation of Authority Regarding Establishment of an Iraqi Special Tribunal (Dec. 10, 2003), available at http://www.iraqcoalition.org/regulations/20031210_CPAORD_48-IST_and_Appendix_A.pdf [hereinafter Order 48].

and issued its Statute, to become effective on 10 December 2001. The IST Statute stipulates that the Baghdadi Criminal Code of 1919, the Iraqi Criminal Code of 1969, and the Iraqi Code of Criminal Procedural Law of 1971 are applicable. The substantive crimes under the tribunal's jurisdiction are laid down in a document called "The elements of the Crimes." The IST Statute mandates that the president of the tribunal draft the rules of procedure and evidence to be adopted by the majority of the permanent judges of the tribunal.⁹⁶ The mandate provides only general guidance, suggesting that the rules should address the conduct of the pretrial phase of the proceedings; trials and appeals; the administration of evidence; the protection of victims and witnesses; and other appropriate matters where applicable law, including the IST Statute, does not or does not provide for a specific situation. The Iraqi Code of Criminal Procedural Law of 1971 should guide the judges. This might be a problem as the Iraqi legal system has a Franco-Egyptian background from the Ottoman era that was adapted by the British during the Mandate period. After independence, the Ba'ath regime planned to adopt the old accusatory model, but, in fact, the judicial system fell into disrepair and disrepute.

This background shaped Iraqi law into a system that resembles more of the civil law tradition than anything else. The present draft of the Rules of Procedure and Evidence of the IST is clearly designed by lawyers from a common law tradition and contrasts the civil law tradition in Iraqi proceedings. The current draft is lapidary and it would not be possible to run trials on basis of the rules only. Where the draft rules are silent on specific issues, it might be problematic to amend the draft rules with provisions of the Code of Criminal Procedure because both systems are not compatible. An investigative judge in the civil tradition, for example, functions within a clear division of the role and powers of that magistrate and the role and powers of the prosecutor. Under the present version of the rules, it appears that the investigative magistrate will draft the charges for the prosecutor to use in the indictment. The draft rules to the Code of Criminal Procedure also contain inconsistent provisions that may cause confusion about competences: for example, when the rules for disclosure are applied in a file system.

Will the trial of Saddam Hussein start this year or next year? Little is known about the planning of the IST. The IST has not yet issued formal indictments with specific charges of Saddam and his lieutenants, which is consistent with the inquisitory tradition. There are preliminary charges to be reviewed by the investigative magistrate and to be used for pretrial investigations. It is expected that the charges will encompass killings of political leaders and religious figures in the past thirty-five years,⁹⁷ including the killings of Kurds in period between 1983 and 1988, and the Shiites in

96. Statute of the Iraqi Special Tribunal art. 16, Dec. 10, 2003, 43 I.L.M. 231, reprinted in Order 48, *supra* note 95, at app. 1, available at <http://iraq-ist.org/en/about/statute.htm>.

97. The Iraqi Special Tribunal has a temporal jurisdiction over the period of 17 July 1968 to 1 May 2003. *Id.* art. 1.

1991. Saddam Hussein appeared before an investigative judge, who informed him of the pretrial charges. This magistrate is also the competent authority to deal with matters of pretrial custody. The broadcasting of that appearance on TV may have confused the public at large, as it appears not everyone understood the procedure. This reminds us of the importance of proper public relations: not only should justice be done, but the public should also perceive that justice was done.

Reports suggest that Saddam Hussein's defense will be based broadly on two principles. This first one is the claim of that the tribunal itself is illegitimate, because it was put in place by an illegal government after an "illegal" invasion.⁹⁸ Playing the "immunity card," as discussed above, may top this defense. This issue might be addressed if the newly elected Iraqi Government either reestablishes the tribunal, or, at last, reenacts the IST Statute. The second defense might be the argument that trials before a domestic court with Iraqi judges cannot be fair. This resembles defenses heard by European courts trying their "Quislings" after the Second World War. Indeed, fairness might raise concerns, because Iraqi judges suffered under the Hussein regime. It is not unrealistic to suppose some bias. Another concern is related to the limited possibilities of a domestic court to guarantee the accused a full defense, such as the opportunity to call all relevant witnesses. Would the tribunal allow Saddam Hussein to call the foreign witness and what powers would the tribunal have to make these witnesses to show up in court? More generally, will the investigative magistrates be able to effectively investigate crimes that happened so long ago? Will there be any Iraqis who would dare to give evidence at the request of Saddam? These are the types of serious issues that led the international community to establish the ICTY and ICTR with powers deriving from the Security Council acting under Chapter VII of the U.N. Charter.

Conclusion

The wave of accountability is gathering strength, but it is too early to draw conclusions from the present experiences. The Milošević trial is at the halfway point; the Saddam Hussein trial has not started. It is not unreasonable to expect that the problems of the Milošević trial may haunt the Saddam Hussein trial as well. The difference is that the ICTY does not suffer from "quantity or quality" problems. The lesson to learn here is that the Iraqi Special Tribunal will need all the international assistance it can get.

98. See, e.g., *supra* notes 80, 92, and 93, and accompanying text.

